No. 78-252

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL REALTY ESTATES COMPANY,

Petitioner,

vs.

CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Federal Realty Estates respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 16, 1978.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. The Court ordered, per Circuit Rule B5, that the opinion remain unpublished and is not to be cited.

JURISDICTION

The Petitioner, Federal Estates Realty Company, is now known as Timbers Development Company, an Illinois Corporation. The Respondents are the City of Chicago, a

Municipal Corporation, Joseph Fitzgerald, both individually and in his official capacity as Commissioner of the Department of Buildings and Richard L. Curry, both individually and in his official capacity as Corporation Counsel of the City of Chicago. The judgment of the Court Of Appeals For The Seventh Circuit was entered on May 16, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. The decision below conflicts in principle with decisions of other federal courts as to the preservation of Petitioner's Fifth and Fourteenth Amendment rights to just compensation for a "taking" of property in the form of a temporary confiscation.

2. The decision below conflicts in principle with decisions of this Court as to the application of the substantive due process protections of Petitioner's property interest in the issuance of the building permits.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

On January 11, 1972, the Petitioner, Federal Realty Estates Company presented to the building department of the City of Chicago applications for 51 separate building sites for the construction of single family low income housing. These applications showed proposed developments in compliance with all applicable laws and ordinances, and Petitioner's intention to pay all lawfully required fees in connection with the processing of the applications. While the applications received preliminary approval when filed, the Building department refused to further process them.

Accordingly, on February 7, 1972, the plaintiff filed in the Circuit Court of Cook County a Petition for Writ of Mandamus, seeking to compel the further processing of its applications. At a hearing on petitioner's petition on May 8, 1972, evidence was presented to the effect that processing of Petitioner's applications had been held up by the pendency of a plan study of the area in which the permits were sought. The evidence also showed that the plan study had been completed in February, 1972 with a recommendation that no zoning changes be made in the subject area. Petitioner's petition for mandamus was thereupon granted, and a writ issued on May 10, 1972.

The defendants in the mandamus action (the City and Building Commissioner Joseph Fitzgerald), with the assistance and cooperation and upon the advice of Richard Curry, Corporation Counsel for the City, appealed the decision of the Circuit Court of Cook County. Disposition of this appeal was delayed by the defendants' request for extended time in which to file a brief and the refusal to expedite oral arguments, which were eventually waived. The only defense raised on appeal was that the plaintiff had failed to resubmit its pending applications after processing was delayed. No authority whatsoever supported

the view that any such resubmission was necessary. Affirming the issuance of the writ the Illinois Appellate Court found that the defendants' refusal to process plaintiff's applications for building permits had been "arbitrary, unfair, and unreasonable" and found the defendants' arguments on appeal to be "totally without merit". Because of the "unnecessary delay caused to the [plaintiff] realtors and the lack of defense by the Building Department of the City of Chicago" the court, setting aside usual practice in such a case, ordered its mandate to issue immediately. This mandate issued on May 16, 1973, over 16 months after the initial submission of the plaintiff's applications.

As a result of the extensive damages suffered from the delay, which completely prevented the project from being carried out, the Petitioner Federal Realty brought the instant action in a federal court in the Northern District of Illinois. The jurisdiction of the District Court was invoked because a question arose under the Constitution as to defendant City of Chicago and because a question arose falling under 28 U.S.C. § 1343 (3), as to the individual defendants. In essence, the Petitioner's complaint alleged that the defendants, acting separately and in concert, had engaged in a wilful and malicious course of conduct by which, through the abuse of their authority under local and state laws, they deprived the plaintiff of its rights under the Fifth and Fourteenth Amendments and 28 U.S.C. § 1983.

The District Court granted defendants' Rule 12 (B) (6) motion to dismiss for "failure to state a claim upon which relief can be granted". The Court of Appeals for the Seventh Circuit affirmed, holding that neither Petitioner's Fifth and Fourteenth Amendment rights against a "taking" without just compensation nor Petitioner's Fourteenth Amendment right against deprivation of property without due process of law were violated.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts in principle with the decisions of other federal courts as to the preservation of petitioner's Fifth and Fourteenth Amendment rights to just compensation for a "taking" of property in the form of a temporary confiscation.

The concept of an action for damages to redress the confiscatory effect of unreasonable land use regulation is widely accepted. (See *e.g. Sanfilippo* v. *County of Santa Cruz,* 415 F. Supp. 1340 (N.D. Cal., 1976); *Donohoe Const. Co.* v. *Maryland-National Capital Park and Planning Commission,* 398 F. Supp. 21 (D. Md., 1975); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal., 1974).

This concept of course is based upon principles established in this Court's decision in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), which established the general rule that at a certain point of "reasonableness" a state infringement upon the exercise of property rights will constitute a confiscation of that property. But the basis for the state interference with property was supposed to be considered along with the effect that the regulation has upon the property. The fact that a regulation has a sufficient connection to the public health, safety, morals, or welfare to render it in otherwise valid police power regulation does not alone insure that there is no "taking". *Benneson* v. *United States,* 548 F. 2d 939 (U.S. Ct. Cl. 1977); *Sanfilippo* v. *County of Santa Cruz,* 415 F. Supp. 1340 (N.D. Cal. 1976); *Brown* v. *Tahoe Regional Planning Agency,* 385 F. Supp. 1128 (D. Nev. 1973). A comparatively moderate interference with property rights may be impermissible if it exceeds the limits of reasonable needs under the circumstances. *Kopetzke* v. *County of San Mateo,* 396

F. Supp. 1004 (N.D. Cal., 1975); and see *Westwood Forest Estates Inc.* v. *Village of So. Nyack*, 23 N.Y. 2d 424, 297 N.Y.S. 129, 244 N.E. 2d 700.

Failing to assess the basis for the interference with petitioner's property rights, the Seventh Circuit has here held that the absence of any basis for Respondent's arbitrary and capricious refusal to issue building permits over a period of sixteen months is constitutionally unimportant due to its effect of blocking only the property's highest and best use, that of single family residences. That the basis of the city's action is unfathomable in terms of any valid state purpose would seem to be of substantially greater importance than the Seventh Circuit has given it here.

There is no issue as to whether Petitioner has a constitutional right to the highest and best use of his land. There is, however, more than sufficient proof that the Respondents acted in a collusive and malicious manner to prevent the construction of improvements on the property, regardless of the highest and best use. The overall pattern of intentional dilatory behavior by Respondents including a refusal to even communicate with the Petitioner demonstrates the ultimate conclusion that no attempt by Petitioner to obtain permits to develop his land could have been expected to succeed until enforced by a writ of mandamus.

Respondents' absolute failure to act is precisely equivalent to a freeze on any reasonable use of Petitioner's property, and not merely a interference with the "highest and best" use.

The effect of allowing a decision to stand such as this is to allow local governments the power to do indirectly what they cannot do directly, i.e., block private use of private land through administrative intransigence and collu-

sion for constitutionally impermissible purposes. Property owners similarly situated will be confronted with the choice of either a one to two year delay while a final court order is obtained, or abandoning their particular housing project due to financing loss or burdensome contractual obligations, as occurred in this case. A *defacto* deprivation of property rights on a large scale could easily ensue, now that the doors have been opened.

2. The decision below conflicts in principal with the decisions of this court as to the application of substantive due process protections of Petitioner's property interests and the issuance of the building permits.

An independent guarantee of rights is contained in the Due Process Clause of the Fourteenth Amendment which provides that property rights shall not be deprived without due process of law. This is essentially a "substantive due process" argument and is established by proving:

(1) The deprivation of a "property" interest by state action and

(2) Such state action bore no substantial relation to the public health, safety, morals, or welfare.

A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. *Perry* v. *Sinderman*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972). Property interests are created and dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules and understandings that secure certain benefits and that support claims of entitlement to those benefits. *Bishop* v. *Wood*, 426 U.S. 341, 344 n. 7, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976), *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed.

2d 548, 561 (1972). Under Illinois law, the controlling state law, Petitioner had an indisputable legitimate claim of entitlement to the benefit of using its property as permitted by the existing zoning. Where there has been a substantial change of position, expenditures or incurrence of obligations by an innocent party in reliance upon the probability of the issuance of a building permit such party has a vested property right . . . *Sgro* v. *Howartz,* 54 Ill. App. 2d 1, 9, 203 N.E. 2d 173, 178 (1964). A brief review of the facts found in the Appellate record will indicate clearly that the Petitioner detrimentally relied extensively on the probability of the issuance of the building permit.

In reliance upon what it conceived to be controlling decisional law, the Seventh Circuit held the Petitioner had no claim of entitlement. The Seventh Circuit reached this result by reasoning that no entitlement to the issuance of a permit arose until City officials established the application conformed to state law requirements. In essence, the court found that no entitlement to the issuance of a permit existed until the permit was issued. In summary, the correctness of the decision below, even assuming the propriety of the statutory tests which were used by the court, is open to serious question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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and
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August 14, 1978

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued April 3, 1978
May 16, 1978.
Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

FEDERAL REALTY ESTATES COMPANY, an Illinois Corporation, now known as TIMBERS DEVELOPMENT COMPANY,

Plaintiff-Appellant,

No. 77-1758 vs.

CITY OF CHICAGO, a Municipal Corporation; JOSEPH FITZGERALD, individually, and in his official capacity as Commissioner of the Department of Buildings; RICHARD L. CURRY, individually, and in his official capacity as Corporation Counsel of the City of Chicago, a Municipal Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4037
Thomas R. McMillen, *Judge*.

ORDER

The sole issue in this appeal is whether the arbitrary refusal by municipal officials to process plaintiff's 51 applications for building permits violated any of plaintiff's

constitutional rights and is thereby actionable under 42 U.S.C. § 1983.

I

On January 11, 1972, plaintiff, through its president, Martin Duggan, submitted to the City of Chicago Building Department applications for permits to build single-family residences on 51 separate sites in the vicinity of 121st Street and Ashland Avenue in Chicago, Illinois. Officials in the Building Department gave preliminary approval to the permits, but delayed final approval pending the results of a zoning plan study being conducted in the area where plaintiff wished to build. Even after the study was completed, and it was clear that there was no reason to alter the preexisting zoning arrangement in the area, the Building Department continued to refuse to process plaintiff's applications.

Plaintiff filed a petition for mandamus in the Circuit Court of Cook County on February 7, 1972, asking the court to order the Building Department to process plaintiff's applications. The court, finding that the zoning study was completed and that it had concluded that no zoning changes were necessary, issued the Writ of Mandamus on May 10, 1972.

The City of Chicago appealed that decision, arguing that plaintiff should be required to resubmit its applications. The Illinois Appellate Court on May 16, 1973, held that the City's "contention is totally without merit," and found that the Building Department's actions had been "arbitrary, unfair and unreasonable." It then ordered its mandate "to issue forthwith."

Subsequently, plaintiff filed a three count complaint in federal district court under 42 U.S.C. § 1983, alleging that defendants' actions had violated its constitutional rights. Specifically, plaintiff alleged first that defendant Fitzgerald as the Commissioner of the Building Department had refused to process the applications, thereby depriving plaintiff of the rightful use of its land; second, that defendant Curry as Corporation Counsel had further delayed plaintiff's rightful use of its property by filing a frivolous appeal; and third, that the City of Chicago was liable under a theory of *respondeat superior* for the actions of its two employees. The district court granted the defendants' Rule 12(b)(6) motion to dismiss for "failure to state a claim upon which relief can be granted." Plaintiff appeals that judgment.

II

In a suit brought under 42 U.S.C. § 1983, plaintiff must demonstrate both that there has been state action and that that action has deprived plaintiff of some constitutional right. *Adickes* v. *S.H. Kress & Co.*, 396 U.S. 144, 169 (1970). There is no dispute here that the action of the City's employees constituted state action. The only issue is whether plaintiff has been deprived of any constitutional rights.[1]

Plaintiff proposes two theories to support its claim that constitutional rights have been violated. First, plaintiff argues that the City's actions were an unreasonable exercise of land use control constituting an "inverse condemnation" or a "taking" of property without just compensation within the meaning of the Fifth and Fourteenth Amendments. *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226 (1897); *Griggs* v. *Allegheny County*,

[1] All of the other issues raised by plaintiff in this appeal are predicated on the assumption that a constitutional right has been violated. In light of our resolution of that issue, we need not consider whether the City can be sued directly under the Fourteenth Amendment for damages or whether the individual defendants' actions are immune from suit under § 1983.

369 U.S. 84 (1962). Thus, plaintiff relies on the Supreme Court's holding in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922), to the effect that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Based on *Mahon* the crucial question becomes when does regulation go "too far." The traditional standard is that regulation is excessive only when "its effects are so complete as to deprive the owner of all or most of his interest in the subject matter. . . ." *United States* v. *General Motors Corp.,* 323 U.S. 373, 378 (1945). Thus, even if the highest valued use of the land is forbidden by the government, there is no "taking" so long as other less valuable, but nonetheless reasonable, uses remain available. *See Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 592 (1962); *South Terminal Corp.* v. *EPA,* 504 F.2d 646, 678 (1st Cir. 1974). It seems to us clear that all that plaintiff lost by the Building Department's actions was the right to put its land to its highest valued use. Merely because single-family dwellings could not be built did not destroy the utility of the property for other valuable purposes. Certainly plaintiff has made no such allegation in its complaint. If plaintiff decided not to find some alternate use for the property during the pendency of the litigation, then the loss was of its choosing. The City cannot be made liable for that decision.

Plaintiff especially argues that recent lower court decisions support a more expansive interpretation of what governmental actions constitute a "taking" and that we should adopt their reasoning. *See Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 709 (D.N.J. 1976); *Inmobiliaria Borinquen, Inc.* v. *Garcia Santiago,* 295 F. Supp. 203 (D.P.R. 1969); *Lomarch Corp.* v. *Mayor of*

Englewood, 51 N.J. 108, 237 A.2d 881 (1968). We need not express any opinion about the appropriateness of those decisions because even if we accept their conclusions they do not support the holding that there has been a "taking" in this case. In *Sixth Camden Corp.,* there was an express finding by a state court that the zoning decision issue robbed the property "of all value." 420 F. Supp. at 722. No similar allegation has been, nor could be, made in this case. In both *Inmobiliaria* and *Lomarch,* the local governments had required the owners of land to reserve those lands for possible future acquisition by the government. In both cases the courts held that there was a "freeze" on the owners' ability to use the land at all during the reservation period. *See* 295 F. Supp. at 201; 237 A.2d at 884. Those holdings are a far cry from saying that during the pendency of a determination of whether a building permit should issue there is a "taking." Even if there are some unreasonable delays there is no "freeze" on plaintiff's ability to make valuable use of the property. Thus, the cases cited by plaintiff do not support holding that there has been a Fifth and Fourteenth Amendment "taking" violation in this case.

III

Plaintiff's second theory is that it has been deprived of property without due process of law in violation of the Fourteenth Amendment. Plaintiff's argument is premised on the notion that it was entitled to a building permit and thus it had a constitutionally protectible property interest. The argument proceeds that if a government official arbitrarily denies an entitlement to an individual then that individual has been deprived of property without due process.

We need not consider the second portion of plaintiff's argument because we are convinced that plaintiff had no entitlement to the building permit during the period of

the state court proceeding. In making that determination, we are guided by the Supreme Court's decision in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), where the Court reasoned:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

In determining whether an entitlement exists, the Court instructed that reference must be had to state law. *Id.*

Applying those standards to this case, it is clear that all that plaintiff was entitled to was to have his applications processed. There was no entitlement to the issuance of a permit until it was demonstrated that the applications conformed to state law requirements, as evaluated by officials in the Building Department. That plaintiff firmly believed that a permit should have been issued does not amount to more than a mere unilateral expectation. As the Cook County Circuit Court held, plaintiff had a right to have his application processed and if "found to be in compliance with the Ordinances of the City of Chicago" to have building permits issued. However, so long as there was some discretion left to the municipal employees to decide whether to issue the permits, plaintiff could not acquire any protectible property interest in those permits.

Plaintiff at one point appears to argue that the due process property interest involved is actually its real property and not the permit. If so, plaintiff is confusing this due process issue with the "taking" issue discussed previously. No greater claim is made, however, by couching the issue directly in terms of the due process clause as opposed to the Fifth Amendment "taking" prohibition as

applied to the states through the Fourteenth Amendment. Thus, our analysis of "taking" effectively disposes of this contention.

Plaintiff also complains about the adverse effect the City's action had on various contractual arrangements that it had entered into in the expectation that the permits would issue without delay. These injuries, however, are in part the fault of plaintiff either for entering into contracts not made contingent on the issuance of these permits or for refusing to wait until the permits were finally issued. This is especially so here where plaintiff was made aware of a study that would delay issuance of the permits. However, even if plaintiff is correct that this delay created certain rights under state law, they were protected by state courts. The delay does not create a constitutionally protectible property interest. Even in the cases plaintiff cites, all that is granted to the applicant to remedy any injury occasioned by the delay is the "right" to go ahead and build in accordance with the permit. *Sgro* v. *Howartz*, 54 Ill. App.2d 1, 203 N.E.2d 173 (1964). That right essentially was protected in the state courts in the mandamus proceeding, and surely could be protected if plaintiff's permit application is denied by a change in the zoning laws. *Id.* at 177.

The only possible wrong involved in this transaction was the failure by the municipal employees to act in accordance with the ordinance requiring the processing of applications. It is well settled that violations of state law causing injury to an individual do not violate the Constitution and thus are not actionable under 42 U.S.C. § 1983. *Snowden* v. *Hughes*, 321 U.S. 1, 11 (1944). Plaintiff has not in truth alleged any violation of its constitutional rights, and therefore the judgment of the district court dismissing plaintiff's section 1983 suit must be affirmed.

AFFIRMED.